STATE OF MICHIGAN

IN THE SUPREME COURT

ROBERT THOMAS CROUCHMAN and SUGAR M. CROUCHMAN,

Plaintiffs,

v

MOTOR CITY ELECTRIC COMPANY and CITIZENS INSURANCE COMPANY,

Defendants,

and

KEVIN JAMES WIECZOREK,

Defendant/Third-Party Plaintiff/Appellee,

v

AUTO-OWNERS INSURANCE COMPANY, a/k/a HOME-OWNERS INSURANCE COMPANY,

Third-Party Defendant/Appellant.

UNPUBLISHED
October 28, 2004

No. 248419
Wayne Circuit Court
LC No. 01-112063-NI

THIRD-PARTY DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

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STATEMENT IDENTIFYING THE ORDER APPEALED

Third-party defendant/appellant Auto-Owners Insurance Company, correctly designated as Home-Owners Insurance Company ("appellant"), seeks leave to appeal from our Court of Appeals's decision denying appellant's motion for reconsideration on December 13, 2004. The Court of Appeals issued its original opinion affirming the trial court's decision on October 28, 2004.

STATEMENT OF QUESTIONS INVOLVED

I. **Should this Court correct the Court of Appeals's fundamental error when the Court of Appeals concluded that the policy provision explicitly extending coverage to an automobile "*not* owned by *or* furnished *or* available for regular use by the insured or anyone living with the insured" provided coverage for an automobile *that was* "furnished or available for regular use by the insured," contrary to this Court's decision in *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999), all other existing precedent interpreting non-owned automobile provisions, the plain language of the policy itself, and the judicially-recognized purpose of non-owned automobile provisions?**

Appellee Wieczorek would answer "No."

Appellant answers "Yes."

II. **If this Court corrects the Court of Appeals's error, should this Court also reverse the trial court's manifest error when the trial court interpreted Section IV(1)(c)(2) of the policy – an exclusion – to create coverage not found under Section IV(1)(a)(1), the provision detailing the scope of coverage, despite the rule stating that an exclusion cannot create coverage as stated in this Court's decisions in *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997), and *Allstate Ins Co v Freeman*, 432 Mich 656, 667-668; 443 NW2d 734 (1989) ?**

Appellee Wieczorek would answer "No."

Appellant answers "Yes."

STATEMENT OF GROUNDS FOR LEAVE TO APPEAL

The ultimate question presented is whether a family automobile insurance policy provides liability coverage for a policyholder's operation of his employer's vehicle that is regularly furnished for his use, when the family policy obviously does not cover that vehicle. There are grounds for leave to appeal here – or more likely, grounds for peremptory reversal by order or per curiam opinion – pursuant to MCR 7.302(B)(5) because the Court of Appeals's opinion blatantly contradicts this Court's decision in *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999), as well as every other existing decision from Michigan[1] and foreign jurisdictions regarding the interpretation of the policy language at issue, which is a variation of the standard non-owned automobile provision almost universally used in motor vehicle policies. The family automobile policy simply does not cover an insured's use of his employer's vehicle when that vehicle is regularly furnished for his use. In *Nikkel*, 460 Mich at 570, this Court held that "the 'non-owned automobile' clause unambiguously provides that an automobile furnished for the regular use of either the named insured or any relative is not a nonowned automobile for purposes of the policy."

Like the other courts that have addressed such provisions, this Court recognized in *Nikkel* that a policy provision in a family automobile policy covering the insured's use of "an automobile not owned by or furnished or available for the regular use of either the named insured . . ." does not cover the insured's use of her employer's vehicle that is regularly

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[1] Including *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 324; 503 NW2d 758 (1993); *State Farm Mutual Automobile Ins Co v Burbank*, 190 Mich App 93; 475 NW2d 399 (1991), lv den 439 Mich 975 (1992), which should have been binding precedent on the Court of Appeals pursuant to MCR 7.215(C)(2).

furnished or available for her use, even the insured does not own that vehicle. *Id.* This conclusion is based on the plain meaning of the policy language, which sets off each criterion with the disjunctive "or," signifying that the existence of *any one* of those three criteria will preclude coverage.

The Court of Appeals in this case, however, ignored *Nikkel*, the policy language, and appellant's arguments, and held that coverage existed because the non-owned automobile provision *covered the insured's use of any vehicle he did not own*, regardless of whether that vehicle was furnished or available for his regular use. This decision effectively rewrote the policy, replacing the disjunctive "or" that sets off each criterion with a conjunctive "and." Instead of three alternative criteria that preclude coverage for the insured's use of a non-owned vehicle, the Court of Appeals held that the policy would provide coverage *unless all three criteria existed*.

The sheer weight of contrary authority demands reversal of this decision. The same or similar policy language is present in nearly every standard automobile policy nationwide, and courts addressing the issue have universally rejected the Court of Appeals's interpretation of that language. Family automobile policies do not cover an insured's operation of a non-owned vehicle that is regularly furnished for the insured's use. See *Nikkel*, 460 Mich at 570; *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 324; 503 NW2d 758 (1993); *State Farm Mutual Automobile Ins Co v Burbank*, 190 Mich App 93; 475 NW2d 399 (1991), lv den 439 Mich 975 (1992); *Seaboard Fire & Marine Ins Co v Gibbs*, 392 F2d 793 (CA 4, 1968); *Kern v Liberty Mutual Ins Co*, 398 F2d 958 (CA 8, 1968); *Carr v Home Indemnity Co*, 404 Pa 27; 170 A2d 588 (1961); *Diorio v New Jersey*

Manufacturers Ins Co, 79 NJ 257; 398 A2d 1274, 1280 (1979); *Birmingham Fire Ins Co v Sharrow*, 249 F Supp 429, 430 (SD Fla, 1965); *Home Ins Co v Kennedy*, 52 Del 42; 152 A2d 115 (1959); *Quesenberry v Nichols*, 208 Va 667; 159 SE2d 636 (1968); *Aler v Travelers Indemnity Co*, 92 F Supp 620 (D Md, 1950); *Commercial Insurance Co of Newark, New Jersey v Gardner*, 233 F Supp 884 (EDSC, 1964); *Giokaris v Kincaid*, 331 SW2d 633 (Mo, 1960); *Foster v Johnstone*, 107 Idaho 61, 64; 685 P2d 802 (1984); *Earl v American States Preferred Ins Co*, 744 NE2d 1025, 1027 (Ind App, 2001), lv den 761 NE2d 419 (Ind, 2001); *Malouf v Aetna Cas & Surety Co*, 275 NJ Super 23, 27; 645 A2d 155, lv den 138 NJ 271 (1994); *Crum and Forster v Travelers Corp*, 428 Pa Super 557, 559-60; 631 A2d 671 (1993); *Volpe v Prudential Property and Casualty Ins Co*, 802 F2d 1 (CA 1, 1986); *Auto Owners Insurance Co v Miller*, 138 Ill 2d 124; 561 NE2d 630 (1990); *Farmers Ins Co of Arizona v Zumstein*, 138 Ariz 469, 675 P 2d 729 (Ariz App 1983); *Auto-Owners Ins Co v Forstrom*, 684 NW2d 494, 496 (Minn, 2004). All of these cases and innumerable others hold that coverage does not exist under the same or similar language if the vehicle is furnished or available for regular use by an insured or an insured's relatives *even though the insured does not own the vehicle.*

This is the only interpretation of the policy language that recognizes its plain meaning. It is also the only interpretation that makes any sense as a matter of logic. The Court of Appeals has created a de facto coverage provision, the second half of which is nugatory. If the policy covers the insured's use of any vehicle he does not own, then the criteria "furnished or available for [ ] regular use" must apply only to vehicles that the insured does own, and it is nearly impossible to imagine a situation where the insured

could not regularly use his own vehicle. It simply defies reason to hold that covering such a nebulous possibility could represent the actual intent of underwriters across the country.

If there was the slightest doubt regarding any aspect of this policy language, the universally-recognized purpose of the non-owned automobile provision erases it. Succinctly stated by the United States Court of Appeals for the Eighth Circuit in *Kern*, 398 F2d at 961, it "is **to protect the insurer from a situation where the insured could purchase one policy for a described vehicle and be covered by the same policy without qualification while operating any and all other automobiles under his control or available for his use.**" (Emphasis added). Accord *Federal Ins Co v Allstate Ins Co*, 111 AD2d 146, 147; 488 NYS2d 780 (1985) ("The purpose of such a provision in an insurance contract is to provide protection to the insured for the occasional or infrequent use of a vehicle not owned by him and is not intended as a substitute for insurance on vehicles furnished for the insured's regular use . . . ."); *American Family Ins Group v Hemenway*, 254 Neb 134, 140; 575 NW2d 143 (1998) ("The [non-owned automobile provision] represents an attempt on the part of the insurance company to **strike a balance between the desire of the insured to be covered, even though not using his own car, and its own right to receive payment of premiums based upon the risk presented by the number of automobiles operated.** It is generally held that **such a clause covers the insured during infrequent or casual use of a nonowned automobile, but excludes coverage as to another's automobile which the policyholder frequently uses or has the opportunity to use** . . . .") (emphasis added); *Harris v Cola*, 732 So 2d 822, 826-827 (La App, 1999) ("The purpose of the regular use exclusion is to **protect an insurance**

company against double coverage when a premium has been paid on only one vehicle. If the insured has access to a second vehicle furnished for his regular use, the insurance company can rightfully require that a premium be paid for the insured's use of the second vehicle.") (emphasis added).

Covering the use of all non-owned vehicles under the insured's personal policy obliterates this purpose because it actually encourages policyholders not to worry about coverage for vehicles they do not own, even when they use those vehicles regularly. If one policy covers all the insured's driving, why would she obtain more coverage than necessary, or encourage her employer to insure its vehicles? The Court of Appeals's decision is out of line with the prevailing law, the plain meaning of the policy language, and the underwriting purpose of non-owned automobile provisions.

Appellant submits that it is entitled to relief here precisely because the Court of Appeals's decision is grossly contrary to existing authority, including this Court's decision in *Nikkel*, 460 Mich at 570, and it would be materially unjust to allow this anomalous decision to bind the parties under MCR 7.302(B)(5). This Court should not require appellant to accept a clearly inadequate determination of its rights under the insurance policy simply because the Court of Appeals ignored the parties' arguments, the law, and the policy language, and rendered an unprecedented decision from whole cloth. As a result, appellant asks this Court to consider reversing the Court of Appeals by peremptory order or per curiam opinion on the basis that the lower court's decision is contrary *Nikkel*, 460 Mich at 570, and the mass of existing authority on this issue.

STATEMENT OF FACTS

As a result of an automobile accident on April 4, 2000, plaintiffs Robert and Susan Crouchman orginally brought this action against third-party plaintiff/appellee Kevin James Wieczorek ("Wieczorek") and his employer, Motor City Electric Company. At the time of the accident, Wieczorek was driving a 2000 Ford Excursion that his employer owned, but that was regularly made available for his use. Motor City Electric Company maintained insurance on the vehicle through Reliance Insurance Company ("Reliance").

The action began on April 10, 2001, but Reliance was subsequently declared insolvent October 3, 2001. As a result, the trial court stayed the case for six months. Pursuant to the Michigan Property and Casualty Guaranty Act (the "Act"), MCL 500.7901 et seq., Wieczorek received new defense counsel. Nevertheless, Wieczorek also requested that appellant tender a defense pursuant to his personal automobile insurance policy, which was effective on the date of the April 6, 2000 accident. A copy of the policy is attached as Exhibit A.

Appellant refused to tender a defense under Wieczorek's personal policy because no coverage existed. Specifically, Section IV of the Policy, entitled "Individual Named Insured," provided the following liability coverage regarding Wieczorek's use of a vehicle he did not own:

> If the first named **insured** in the Declarations is an individual and the **automobile** described in the Declarations is a **private passenger automobile** the following extensions of coverage apply.
>
> **1. LIABILITY COVERAGE - BODILY INJURY AND PROPERTY DAMAGE**
>
> **a.** The Liability Coverage provided for **your automobile** (that is not a **trailer**) also applies to an **automobile** (that is not a **trailer**) not:

(1) owned by or furnished or available for regular use to **you** or anyone living with **you**. However, **we** will cover **your** liability for **your** use of an **automobile** (that is not a **trailer**) owned by or furnished for the regular use of a **relative**.

(2) used in an **automobile** garage repair shop, sales agency, service station or public parking business **you** own or operate.

b. **We** extend this coverage only:

(1) to **you**;
(2) to **relatives** who do not own an **automobile** (that is not a **trailer**); and
(3) to anyone legally responsible for the use of the **automobile** (that is not a **trailer**) by the persons in (1) and (2) above.

c. **We** do not cover:

(1) the owner of the **automobile** (that is not a **trailer**).
(2) an **automobile** used in **your** business or occupation or that of a **relative**, unless it is:
  (a) a **private passenger automobile**; and
  (b) used by **you**, such **relative** or the chauffeur or household employee of either.

Appellant's position was that § IV(1)(a)(1) precluded coverage for the April 6, 2000 accident because Wieczorek was driving a vehicle he did not own but that was regularly furnished for his use.

Wieczorek then filed the third-party complaint against appellant seeking a declaratory judgment regarding coverage that is the subject of this appeal. After discovery, the parties filed motions for summary disposition. Appellant argued that § IV(1)(a)(1) precluded coverage because the vehicle involved in the accident was furnished for Wieczorek's regular use. Wieczorek argued that the policy was ambiguous and that § IV(1)(c) could be construed as an

"extra grant of coverage for private passenger automobiles," even though the provisions was clearly an exclusion.

On January 13, 2003, the trial court issued an opinion granting Wieczorek's motion for summary disposition and denying appellant's motion. The court relied the § IV(1)(c) exclusion to create coverage for the accident:

> To assist in analyzing the language of the Auto-Owners Insurance policy, it seems helpful to me to reduce the relevant sentences on page 11 to their essentials, and I suggest that this is the effect of what is said:
>
> > Besides the liability coverage we extend to you regarding your automobile identified in this policy, we also extend that liability coverage to any other automobile that you drive, unless you own the automobile or it is furnished or available to you for your regular use. We also do not cover an automobile you use in your business, unless it is a private passenger automobile.
>
> **The clear implication of the phrase "unless it is: (a) a private passenger automobile; and used by you . . . ," is that liability coverage is afforded if the vehicle used in the business happens to be a private passenger automobile**. Or, to put it another way, the vehicles excluded from coverage when used in one's business are all automobiles other than private passenger automobiles.
>
> * * *
>
> Nevertheless, we are supposed to interpret these policies according to what the natural expectation of one reading the language [is], and here the natural and literal impact of the language, I say, is to afford coverage for a non-owned private passenger automobile used in business. [Exhibit B, Opinion, 1/13/02l emphasis added.]

Appellant filed a motion for reconsideration or rehearing, which the trial court denied on February 3, 2003. The trial court entered a final order on April 22, 2003, and appellant filed a timely claim of appeal with the Court of Appeals on May 9, 2003. After both parties filed their briefs, appellant filed a motion for peremptory reversal pursuant to MCR 7.211(C)(4), arguing

that the trial court's use of an exclusion to create coverage was a manifest error warranting immediate reversal. The Court of Appeals denied the motion on June 25, 2004. (Exhibit C, Order Denying Peremptory Reversal, 6/25/04).

On October 28, 2004, the Court of Appeals issued an unpublished opinion affirming the trial court's decision. *Crouchman v Motor City Electric Co, et al*, unpublished opinion per curiam of the Court of Appeals, decided October 28, 2004 (Docket No. 248419), pp 2-3 (Exhibit D). The Court of Appeals recognized that "[t]here is no dispute that Wieczorek would not be covered under the main part of the agreement," and that "[t]here is also no dispute that Wieczorek is the first-named insured, who was driving a private passenger automobile, for purposes of this provision. Nor is it disputed that the vehicle in question was owned by Motor City Electric, that it was regularly made available to Wieczorek, and that Wieczorek was driving it within the scope of his employment with Motor City."

Instead of addressing appellant's arguments or the trial court's reasoning, however, the Court of Appeals decided the matter by interpreting § IV(1)(a)(1) to create coverage:

> Auto-Owners complains that the trial court erred in reading an exception to an exclusion as creating coverage. [Citation omitted.] However, § IV of the contract announces that certain "extensions of coverage" apply. Subsection 1a, then, sets forth a general extension of coverage, subject to the exceptions that follow. Again, that provision states that coverage "also apples to an automobile . . . not . . . owned by or furnished or available for regular use to you . . . ." Auto-Owners recasts this passage so as to "not provide liability coverage for automobiles not owned by, and which are furnished or available for regular use to him and available for his regular use." We cannot accept this artful reading. Auto-Owners first implies that 1a sets forth an exclusion, and that the exclusion then applies to vehicles not one's own, but that are furnished or made available to one. The passage in fact introduces an extension of coverage, not an exclusion. Next, Auto-Owners presents the negative indicator "not" as applying only to the first of the three terms set off from, and following, it. Auto-Owners then also changes the first "or" to "and which," substituting the subordinate conjunction "which" for the coordinating conjunction "or."

> **In fact, the passage extends coverage to automobiles that do not meet certain criteria, then lists three, set off by "or." This, for present purposes, indicates that coverage is extended to an automobile not owned by Wieczorek, or not furnished to Wieczorek, or not available for Wieczorek's regular use, subject to the exceptions that follow.**
>
> **The car in question was both furnished to Wieczorek and made available for his regular use, and so those terms do not extend coverage to him. But Wieczorek did not own the car, which triggers coverage under the first of the three terms, subject to the exceptions that follow.** Bearing on this issue is subsection 1c(2), "We do not cover . . . an automobile used in your business or occupation . . . unless it is . . . a private passenger automobile . . . used by you . . . ." **Thus coverage is initially extended because Wieczorek did not own the vehicle involved in the accident; coverage is then withdrawn because the car was used in his occupation; coverage is then restored because the car was indeed a private passenger automobile used by Wieczorek.**
>
> **Although the contract language in dispute was not entirely clear, we are satisfied, on review de novo, that the trial court properly resolved the ambiguity in favor of coverage.** [Exhibit D, pp 2-3; emphasis added; citations omitted.]

Appellant filed a motion for reconsideration with the Court of Appeals, arguing that the Court's decision was contrary to existing Michigan law interpreting the policy language at issue. Specifically, appellant cited numerous authorities indicating that § IV(1)(a)(1)'s policy language precluded coverage when the vehicle at issue was furnished or available for the insured's regular use, even though the insured did not own the vehicle. Nevertheless, the Court of Appeals denied reconsideration on December 13, 2004. (Exhibit E, Order, 12/13/04).

Appellant now seeks leave to appeal to this Court, or reversal by peremptory order or per curiam opinion, to correct the errors of both lower courts.

ARGUMENT

As noted, the Court of Appeals failed to address the issue appellant preserved and presented for review: that the trial court improperly used an exclusion to create coverage for Wieczorek's accident, even though that accident was outside the scope of coverage. Instead, the Court of Appeals improperly concluded that a policy provision explicitly extending coverage to an automobile "not owned by or furnished or available for regular use by the insured or anyone living with the insured" provided coverage for an automobile that was "furnished or available for regular use by the insured." Appellant will address the Court of Appeals's error below, and will also briefly address the trial court's error and ask this Court to remand this case to the trial court to enter judgment as a matter of law for appellant.

I. THIS COURT SHOULD CORRECT THE COURT OF APPEALS'S FUNDAMENTAL ERROR BECAUSE IT IMPROPERLY CONCLUDED – CONTRARY TO THIS COURT'S DECISION IN *FARM BUREAU V NIKKEL* – THAT THE POLICY PROVISION EXPLICITLY EXTENDING COVERAGE TO AN AUTOMOBILE THAT IS "*NOT* OWNED BY *OR* FURNISHED *OR* AVAILABLE FOR REGULAR USE BY THE INSURED OR ANYONE LIVING WITH THE INSURED" PROVIDED COVERAGE FOR AN AUTOMOBILE *THAT WAS* "FURNISHED OR AVAILABLE FOR REGULAR USE BY THE INSURED," CONTRARY TO ALL EXISTING LAW INTERPRETING NON-OWNED AUTOMOBILE PROVISIONS.

The Court of Appeals held that Wieczorek was entitled to coverage in this matter because he did not own the vehicle he was driving at the time of the accident, even though the Court recognized that the vehicle was "both furnished to Wieczorek and made available for his regular use . . . ." (Exhibit B, p 3). This decision contradicts this Court's holding in *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999), contradicts other decisions from both Michigan and other jurisdictions interpreting the language of non-owned automobile provisions, and also obviates the recognized purpose of such provisions. As a

result, the Court of Appeals clearly erred, and this Court should correct this error pursuant to MCR 7.302(B)(5).

A. Standard of review

Because the facts are undisputed, the case will turn on the interpretation of the contract provision at issue. The proper interpretation of a contract is a question of law that this Court reviews de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001).

B. *Nikkel* and other cases from both Michigan and foreign jurisdictions have uniformly held that the policy language at issue here precludes coverage if any one of the enumerated criteria exist.

The relevant portion of the policy in Section IV(1) provides as follows:

> **a.** The Liability Coverage provided for **your automobile** (that is not a **trailer**) also applies to an **automobile** (that is not a **trailer**) not:
>
> > **(1)** owned by or furnished or available for regular use to **you** or anyone living with **you**. However, **we** will cover **your** liability for **your** use of an **automobile** (that is not a **trailer**) owned by or furnished for the regular use of a **relative**. [Exhibit A;
> >
> > underline added.]

Courts in both Michigan and other jurisdictions have considered and rejected the Court of Appeals's interpretation of the policy language at issue in this case. Section IV(1)(a)(1) of the policy reflects the standard language of the so-called "non-owned automobile provision" found in most automobile insurance policies. With little variation, these provisions state that the insured's use of "an automobile not owned by or furnished or available for the regular use of either the named insured . . ." is covered by the insured's policy for his own vehicle. See Miller's Standard Insurance Policies Annotated, Form PAP D1C.

First and foremost, this Court recognized in *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 570; 596 NW2d 915 (1999), that "the 'non-owned automobile' clause unambiguously provides **that an automobile furnished for the regular use of either the named insured or any relative is not a nonowned automobile for purposes of the policy**."[2] (Emphasis added). Like the language at issue in this case, the policy in *Nikkel* provided coverage for "an automobile or trailer **not owned by or furnished for the regular use of either the named insured or any relative** . . . ." *Nikkel*, 460 Mich at 562; emphasis added. Also like the facts of this case, the insured in *Nikkel* did not own the vehicle involved in the accident. *Id.* at 561.

Nevertheless, the *Nikkel* Court held that the insured's non-ownership of the vehicle was not enough because coverage would still be precluded if the vehicle was furnished or available for his regular use: "**We conclude that the nonowned automobile clause is unambiguous, and, thus, the policy does not cover vehicles furnished for regular use of either the named insured or any relative, unless the vehicle qualifies as a 'temporary substitute vehicle.**'" *Id.* at 570; emphasis added.

Our Court of Appeals also recognized the proper interpretation of a non-owned automobile clause in *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 324; 503 NW2d 758 (1993). The policy provision in that case provided that a "[n]on-Owned Car -- means a car not: 1. owned by, 2. registered in the name of, or 3. furnished or available for the regular or frequent use of: you, your spouse, or any relatives." *Stanke*, 200 Mich App at 314.

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[2] *Nikkel* overruled a prior decision, *Powers v DAIIE*, 427 Mich 602; 398 NW2d 411 (1986), that concluded the non-owned automobile provision was ambiguous.

The Court held that this provision precluded coverage for a "non-owned car" if any of the three enumerated criteria existed:

> It must be kept in mind that **the nonowned vehicle coverage not only requires that the vehicle not be owned by the insured, but also that it not be furnished for the regular or frequent use of the insured. Thus, even if someone other than [the insured] actually owned the vehicle, there may still not be coverage under the nonowned vehicle provision because the vehicle was nevertheless supplied to [the insured] for his regular or frequent use.** [*Id.* at 324; emphasis added.]

Our Court of Appeals reached the same conclusion in *State Farm Mutual Automobile Ins Co v Burbank*, 190 Mich App 93; 475 NW2d 399 (1991), lv den 439 Mich 975 (1992). *Burbank* involved the same policy language at issue in *Stanke*, 200 Mich App at 314. The *Burbank* Court recognized that the insured did not own the vehicle involved in the accident, but nevertheless held that this vehicle "is also excluded from the definition of a 'non-owned car' if its owner, Robert Clemens, is considered a relative of [the insured], as the term 'relative' is defined in the insurance policy." *Burbank*, 190 Mich App at 98. Like the *Stanke* Court, the *Burbank* Court thus recognized that the non-owned automobile provision precluded coverage if any one of the enumerated criteria existed, contrary to the Court of Appeals's decision in this case.

Nikkel, *Stanke*, and *Burbank* all invalidate the Court of Appeals's interpretation of the policy language at issue in this case. Like the non-owned automobile provisions in all three of those cases, Section IV(1)(a)(1) precludes coverage for the insured's use of a vehicle "applies to an automobile . . . not: (1) owned or and furnished or available for regular use . . . ," with the disjunctive "or" setting off each of the three criteria. All three cases hold that coverage does not exist under this language if the vehicle is furnished or available for regular use by an

insured or an insured's relatives *even though the insured does not own the vehicle.* Pursuant to these decisions, the Court of Appeals's decision in this case is clear error, and this Court should reverse it.

1. Decisions from foreign jurisdictions and secondary authorities uniformly reach the same result as *Nikkel.*

Michigan is not the only jurisdiction that recognizes the proper interpretation of non-owned automobile provisions. The United States Court of Appeals for the Eighth Circuit rejected the Court of Appeals's rationale in this case on similar facts in *Kern v Liberty Mutual Ins Co*, 398 F2d 958 (CA 8, 1968). The insured in *Kern* was driving a Volkswagen bus owned by his employer when he struck a pedestrian. He sought coverage under a policy he had with the appellee insurer for his own personal vehicle under the non-owned automobile provision of that policy. *Kern*, 398 F2d at 959. Using substantially identical language to that at issue here, the policy in *Kern* defined a non-owned automobile as "an automobile not owned by or furnished or available for the regular use of either the named insured or any resident of the same household . . . ." *Id.*

The insured argued that the non-owned automobile provision was ambiguous and "that the use of the disjunctive 'or' requires an interpretation that coverage exists if the vehicle was either owned or non-owned; and that, since the vehicle here involved was non-owned, ' . . . the vehicle fits the first part of the disjunctive definition, and qualifies as a non-owned automobile.'" *Kern*, 398 F2d at 960. Thus, the insured argued that because he did not own the vehicle involved in the accident, there was coverage regardless of whether it was furnished or available for his regular use.

The Eighth Circuit rejected the insured's argument and held that the non-owned automobile provision did not extend coverage to an accident involving a vehicle furnished or available for the insured's regular use, even if the insured did not own the vehicle himself:

> The interpretation urged by appellant is based on and limited to the disjunctive word "or," and would require us to disregard all other associated parts of the policy.
>
> It would also be contrary to and require the disregard of the judicially recognized and **obvious underwriting purpose of such policy provisions, which is to protect the insurer from a situation where the insured could purchase one policy for a described vehicle and be covered by the same policy without qualification while operating any and all other automobiles under his control or available for his use.** [*Lincombe v State Farm Mutual Automobile Insurance Co*, 166 So 2d 920, 924 (La App, 1964); *Rodenkirk, for Use of Deitenbach v State Farm Mutual Automobile Insurance Co*, 325 Ill App 421; 60 NE2d 269 (1945); and *Glisson v State Farm Mutual Automobile Insurance Co*, 246 SC 76, 142 SE 2d 447 (1965).]
>
> **On this issue of alleged ambiguity in the definition of a non-owned automobile, as contained in the policy, we find in favor of the appellee and hold that the policy excludes from coverage a non-owned automobile that was "furnished or available for the regular use * * * of the named insured."** [*Kern*, 398 F2d at 961; emphasis added.]

Our Court of Appeals adopted the same position here that the Eighth Circuit rightly rejected in *Kern*. The language in appellant's policy is essentially identical to the policy in *Kern*; both provide coverage for automobiles "not owned by or furnished or available for [ ] regular use . . . ." Our Court of Appeals held that because the disjunctive "or" appears between "owned," "furnished," and "available for regular use," and Wieczorek did not own the vehicle, it was covered under the non-owned automobile provision even though *it was* furnished and available for Wieczorek's regular use. But this holding ignores both the plain meaning of the policy language and "the recognized and obvious underwriting purpose of such policy provisions."

The Supreme Court of Pennsylvania also interpreted the non-owned automobile provision to provide no coverage for the insured's use of a vehicle that she did not own, but that was owned by a relative in her household, in *Carr v Home Indemnity Co*, 404 Pa 27; 170 A2d 588 (1961). The policy in *Carr* "defined a 'non-owned automobile' as 'an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative . . . .'" The insured argued that this language "could mean any automobile not owned by the insured." *Carr*, 404 Pa at 30. The *Carr* Court rejected this argument:

> [W]e can not accept this contention. **Reading the policy as a whole we find that the term 'non-owned automobile' is clearly defined in the policy as not including an automobile driven by the insured but owned by a relative, and said term is not ambiguous. If we were to hold otherwise we would be rewriting the insurance policy for the parties and this we can not do.** [*Carr*, 404 Pa at 31; emphasis added.]

These decisions are representative of the national jurisprudence regarding the interpretation of non-owned automobile provisions. See *Diorio v New Jersey Manufacturers Ins Co*, 79 NJ 257; 398 A2d 1274, 1280 (1979); *Birmingham Fire Ins Co v Sharrow*, 249 F Supp 429, 430 (SD Fla 1965); *Home Ins Co v Kennedy*, 52 Del 42; 152 A2d 115 (1959); *Quesenberry v Nichols*, 208 Va 667; 159 SE2d 636 (1968); *Aler v Travelers Indemnity Co*, 92 F Supp 620 (D Md, 1950); *Commercial Insurance Co of Newark, New Jersey v Gardner*, 233 F Supp 884 (EDSC, 1964), all of which hold that coverage does not exist under the same or similar language if the vehicle is furnished or available for regular use by an insured or an insured's relatives *even though the insured does not own the vehicle.* See also *Giokaris v Kincaid*, 331 SW2d 633 (Mo, 1960), and *Foster v Johnstone*, 107 Idaho 61, 64; 685 P2d 802 (1984) (collecting similar cases). Secondary authorities also support this conclusion. See, e.g.,

7 Am Jur 2d, Automobile Insurance, § 215;[3] 8 Couch on Insurance 3d, § 121:76;[4] Anno: *Exclusion from "drive other cars" provision of automobile liability insurance policy of other automobile owned, hired, or regularly used by insured or member of his household*, 86 ALR 2d 937(collecting similar cases).

The Court of Appeals decision in this case simply cannot stand under the weight of contrary authority. Because this decision presents such an anomaly, this Court should reverse it to preserve the proper interpretation of this universal policy language.

C. The Court of Appeals improperly rewrote Section IV(1)(a)(1) and replaced the disjunctive "or" with the conjunctive "and," creating new language that provided coverage *unless all three criteria* from Section IV(1)(a)(1) exist, when the actual policy language precludes coverage *if any one of the criteria* exists.

Nikkel, 460 Mich at 567, and the countless other decisions that reach the same conclusion regarding similar policy language, are nothing more than judicial recognition of the plain language of policy provision. As noted, § IV(1)(a)(1) provides as follows:

> **a.** The Liability Coverage provided for **your automobile** (that is not a **trailer**) also applies to an **automobile** (that is not a **trailer**) not:
>
> > **(1)** owned by or furnished or available for regular use to **you** or anyone living with **you**. However, **we** will cover **your** liability for **your** use of an **automobile** (that is not a **trailer**) owned

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[3] "Clauses extending liability coverage to vehicles not owned by the insured characteristically exclude vehicles furnished to the insured for frequent or regular use . . . . Regular use over an extended period falls within the exclusion; thus, a vehicle furnished to an employee for use in the normal course of his employment generally is regarded to be furnished for regular use, and this is true whether such use is restricted to the employee's working hours, or whether the employee is permitted to keep the car at his home."

[4] "Although coverage has been found where an employee used a vehicle furnished to him or her for business purposes and used such vehicle on a personal errand, clearly regular personal use of the employer's vehicle should be excluded."

by or furnished for the regular use of a **relative**. [Exhibit A; underline added.]

By its plain terms, § IV(1)(a) extends coverage to automobiles *that do not meet* certain criteria. It accomplishes this by using the negative "not" and then providing a list of three criteria that cannot be present for coverage to exist. Importantly, even though § IV(1)(a) extends coverage, the provision is phrased in the negative, and so requires the negation or non-existence of the listed criteria. The Court of Appeals's error was its failure to recognize that the plain language of the policy precludes coverage if any one of the listed criteria exist.

The three criteria are set off using the disjunctive "or," signifying that the existence of *any one* of those three criteria will preclude coverage.[5] *Burnett v City of Adrian*, 414 Mich 448, 465; 326 NW2d 810 (1982) (use of disjunctive "or" in statute requires proof of only one of the two enumerated elements); *Morbark Industries, Inc v Western Employers Ins Co*, 170 Mich App 603, 612; 429 NW2d 213 (1988), lv den 432 Mich 896 (1989) (use of disjunctive "or" in insurance policy requires proof of only one of two stated occurrences).[6] Thus, the policy's liability coverage extends to an automobile that is *not* (1) owned by the insured or anyone living with the insured, *or* (2) furnished to the insured or anyone living with the insured, *or* (3) available for regular use by the insured or anyone living with the insured. If the automobile at

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[5] "'Or' is . . . a disjunctive, used to indicate a disunion, a separation, **an alternative**." *Michigan Public Serv Co v Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949). (Emphasis added).

[6] See also *Spielmaker v Lee*, 205 Mich App 51, 56; 517 NW2d 558 (1994) ("That is, by employing the disjunctive 'or' rather than the conjunctive 'and' in the phrase 'a child which the court has determined to be a child born or conceived during the marriage but not the issue of that marriage,' the Legislature implies that a child who was either conceived or born during a marriage, but not necessarily both, is the legitimate issue of the marriage unless a court has determined otherwise.")

issue *is* owned by the insured, or *is* furnished to the insured, or *is* available for regular use by the insured, there is no coverage.

The Court of Appeals improperly rewrote the policy language and replaced the disjunctive "or" that sets off each criterion with a conjunctive "and,"[7] which changes the meaning of the clause. Specifically, the Court of Appeals determined that *unless all three criteria existed*, the policy provided coverage. If the Court of Appeals were correct, the policy would have stated that coverage **"applies to an automobile (that is not a trailer) not: (1)owned by and furnished and available for regular use to you or anyone living with you. . . ."** Under this hypothetical language, coverage would exist if Wieczorek did not own the vehicle, even though it was furnished and available for his regular use, because only two of the three criteria would be present.

So the Court of Appeals interpreted policy language that did not exist. Section IV(1)(a)(1) of the policy in this case clearly sets off each of the three criteria with the disjunctive "or," *not* a conjunctive "and," and so there is no coverage *if any one of the three criteria exist.* The Court of Appeals's failure to recognize this fundamental rule of interpretation was clear error.

II. THIS COURT SHOULD ALSO REVERSE THE TRIAL COURT'S MANIFEST ERROR BECAUSE THE TRIAL COURT INTERPRETED SECTION IV(1)(C)(2) OF THE POLICY – AN EXCLUSION – TO CREATE COVERAGE NOT FOUND UNDER SECTION IV(1)(A)(1), THE PROVISION DETAILING THE SCOPE OF COVERAGE, DESPITE THE RULE STATING THAT AN EXCLUSION CANNOT CREATE COVERAGE.

Although the Court of Appeals never addressed it, appellant's argument on appeal was that the trial court erred when it ruled that § IV(1)(c)(2) of the policy, irrefutably an exclusion, provided

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[7] "'And' is a conjunctive, used to denote a joinder, a union." *Cheboygan*, 324 Mich at 341.

coverage for Wieczorek. Because the basis for the trial court's decision may again be at issue if this Court reverses the Court of Appeals, appellant will address the issue here, and asks this Court to remand this case to the trial court to enter judgment as a matter of law for appellant.

In the simplest terms, an exclusion in an insurance policy cannot create coverage or expand the scope of coverage. Rather, an exclusion negates coverage for a loss that would have otherwise been within the scope of coverage. Here, Wieczorek's accident involved his employer's vehicle, which he regularly used, and so it was outside the scope of coverage under § IV(1)(a)(1). The trial court ruled that § IV(1)(c)(2), an exclusion, created coverage for this incident. The trial court's ruling was therefore clear legal error, and if this Court reverses the Court of Appeals decision, appellant asks this Court to also reverse the trial court's decision so that appellant's relief is complete.

A. Standard of review

Appellant relies on its statement of the standard of review in § II.A, above.

B. Michigan law requires that the determination of coverage precede the consideration of exclusions. Exclusions thus cannot create coverage or expand the scope of coverage.

This Court stated the rule regarding the consideration of exclusions when interpreting insurance policies in *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997):

> Interpretation of an insurance policy ultimately requires **a two-step inquiry: first, a determination of coverage** according to the general insurance agreement and, **second, a decision regarding whether an exclusion applies to negate coverage**. [Emphasis added.]

Our Court of Appeals has also correctly ruled that exclusions limit coverage, and thus cannot grant or create coverage in *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369, 384-385; 460 NW2d 329 (1990):

> [E]xclusionary clauses limit the scope of coverage provided under the insurance contract; they do not grant coverage. . . . . Moreover, the court pointed out that each individual exclusion refers, not to the other exclusions, but to the hazards insured against *by the insurance contract.* Accordingly, "exclusions are to be read 'with the insuring agreement, independently of every other exclusion.'" [Citations omitted.]
>
> * * *
>
> . . . [W]e conclude that the exclusions are not to be read cumulatively, but individually. Doing so, we conclude that each, standing alone, is clear and unambiguous. **Exclusion (a) and the exception contained therein do not create coverage**. [Emphasis added.]

See also *Allstate Ins Co v Freeman*, 432 Mich 656, 667-668; 443 NW2d 734 (1989) ("the proper construction of a contract requires that we first determine whether coverage exists, and then whether an exclusion precludes coverage"); *Frankenmuth Mutual Ins Co v Kompus*, 135 Mich App 667, 678; 354 NW2d 303 (1984), lv den 421 Mich 863 (1985) ("even before considering the business pursuits exclusion, coverage should initially have been denied [appellant] under the basic terms of the [appellees'] homeowner policies"); *State Farm Mutual Automobile Ins Co v Roe*, 226 Mich App 258, 263; 573 NW2d 628 (1997) ("Exclusions limit the scope of coverage provided and are to be read with the insuring agreement and independently of every other exclusion," citing *Vector,* 185 Mich App at 384); *Auto-Owners Ins*

Co v Churchman, 440 Mich 560, 567; 489 NW2d 431 (1992) ("coverage under a policy is lost if any exclusions within the policy applies to an insured's particular claims"); *Buczkowski v Allstate Ins Co*, 447 Mich 669, 682; 526 NW2d 589 (1994); *Heniser v Frankenmuth Mutual Ins*, 449 Mich 155, 172; 534 NW2d 502 (1995).[8]

These cases clearly establish the analysis that the trial court should have followed here. The first step was to determine coverage under the terms of the policy. If and only if there was coverage, the second step was to determine if any exclusions negated coverage. According to this analysis, it was clearly improper for the trial court to consider an exclusion before it determined that coverage existed, but that it exactly what the trial court did. Moreover, the court determined that an exclusion actually *provided* broader coverage than the scope of coverage provisions provided.

C. The trial court improperly ruled that Section IV(1)(c)(2) of the policy – an exclusion – to provided coverage.

As noted above, the relevant portion of the policy in Section IV provides as follows:

> If the first named **insured** in the Declarations is an individual and the **automobile** described in the Declarations is a **private passenger automobile** the following extensions of coverage apply.
>
> **1. LIABILITY COVERAGE - BODILY INJURY AND PROPERTY DAMAGE**

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[8] This principle regarding the effect of exclusions is so well-entrenched in Michigan jurisprudence that it often surfaces in unpublished opinions. See, e.g., *FL Jursik Co v The Travelers Indemnity Ins Co*, unpublished opinion per curiam of the Court of Appeals, decided November 14, 1997 (Docket No. 199913) (attached as Exhibit E, p. 2) ("First, the Court must determine if the general insurance agreement provides coverage for a particular act. If so, the Court must then determine whether an exclusion applied to negate coverage."); *Frankenmuth Mutual Ins Co v Schmidt*, unpublished opinion per curiam of the Court of Appeals, decided July 21, 2000 (Docket No. 215698) (attached as Exhibit F, p. 4) ("'The proper construction of a contact requires that one first determine whether coverage exists, then whether an exclusion precludes coverage.").

a. The Liability Coverage provided for **your automobile** (that is not a **trailer**) also applies to an **automobile** (that is not a **trailer**) not:

(1) owned by or furnished or available for regular use to **you** or anyone living with **you**. However, **we** will cover **your** liability for **your** use of an **automobile** (that is not a **trailer**) owned by or furnished for the regular use of a **relative**.

(2) used in an **automobile** garage repair shop, sales agency, service station or public parking business **you** own or operate.

b. **We** extend this coverage only:

(1) to **you**;

(2) to **relatives** who do not own an **automobile** (that is not a **trailer**); and

(3) to anyone legally responsible for the use of the **automobile** (that is not a **trailer**) by the persons in (1) and (2) above.

By its own terms, Section IV of the policy extends coverage to certain losses not covered by previous policy sections. Sections IV(1)(a) and (b) provide the scope of the extension; in other words, they specifiy the losses to which coverage will be extended. The fact that subsection (1)(a) is phrased in the negative is irrelevant to its effect. It clearly outlines the scope of the extended coverage for vehicles not owned nor furnished for regular use. These two subsections are in stark contrast to Section IV(1)(c), which provides exclusions from the coverage extended in the preceding paragraphs:

c. **We** do not cover:

(1) the owner of the **automobile** (that is not a **trailer**).

(2) an **automobile** used in **your** business or occupation or that of a **relative**, unless it is:

(a) a **private passenger automobile**; and
(b) used by **you**, such **relative** or the chauffeur or household employee of either. [Exhibit A, Section IV of Policy, (emphasis in original; underline added).]

Here, it is undisputed that the automobile at issue was furnished for Wieczorek's regular use. As a result, coverage does not exist under Section IV(1)(a)(1). That is the end of the analysis, or at least it should have been. Instead, the trial court engaged in a belabored analysis of the exclusion in Section IV(1)(c)(2), and determined in error that the exception to the exclusion provided coverage, contrary to *Harrington*, 455 Mich at 382, and *Vector*, 185 Mich App at 384-385:

> To assist in analyzing the language of the Auto-Owners Insurance policy, it seems helpful to me to reduce the relevant sentences on page 11 to their essentials, and I suggest that this is the effect of what is said:
>
> > "Besides the liability coverage we extend to you regarding your automobile identified in this policy, we also extend that liability coverage to any other automobile that you drive, unless you own the automobile or it is furnished or available to you for your regular use. **We also do not cover** an automobile you use in your business, unless it is a private passenger automobile."
>
> **The clear implication of the phrase "unless it is: (a) a private passenger automobile; and used by you . . . ," is that liability coverage is afforded if the vehicle used in the business happens to be a private passenger automobile. Or, to put it another way, the vehicles excluded from coverage when used in one's business are all automobiles other than private passenger automobiles.**" [Exhibit B; emphasis added.]

The trial court's error is immediately apparent: it read § IV(1)(c)(2), an exclusion with an exception, as a provision expanding the scope of coverage to the accident at issue, involving Wieczorek's use of a vehicle he did not own but that was furnished for regular use,

and ignoring that this accident was outside the actual scope of coverage. Section IV(1)(c)(2) expressly states that "[w]e **do not cover** . . . ." (Emphasis added). Regardless of the context, this is clearly a negation; it *takes away* coverage. Under *Harrington*, 455 Mich at 382 and the other cases cited above, such an exclusion does not provide coverage at all, much less expand coverage beyond the scope of coverage provisions. Section IV(1)(c)(2) should have irrelevant unless the trial court determined that coverage existed, and the court's consideration of the exclusion before that point was manifest error.

So the trial court's decision is without support in Michigan law regarding the interpretation of insurance policies or the structure of this policy itself. Section IV(1)(c)(2) is irrefutably an exclusion, and an exclusion cannot provide coverage under *Harrington*, 455 Mich at 382, and *Vector*, 185 Mich App at 384-385. As a result, the trial court's ruling that § IV(1)(c)(2) provided coverage for the accident at issue, involving Wieczorek's use of a vehicle he did not own but that was furnished for regular use, was improper, and appellant asks this Court to reverse the trial court and remand this matter for the entry of a judgment as a matter of law for appellant. In the alternative, appellant asks this Court to remand this matter to the Court of Appeals for a proper review of the trial court's decision.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals's decision here cannot withstand this Court's decision in *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999). It is also contrary to every existing precedent from Michigan and foreign jurisdictions regarding the interpretation of the policy language at issue, which is a variation of the standard non-owned automobile provisions used in motor vehicle policies. Based on the vast number of authorities so holding, it is simply beyond dispute that the policy language at issue precludes coverage if the vehicle at issue is furnished or available for regular use by an insured or an insured's relatives *even though the insured does not own the vehicle.* The Court of Appeals reached the opposite conclusion, ignoring *Nikkel*, the plain meaning of the policy langauge, and all other precedent. For these reasons, appellant submits that this matter presents grounds for peremptory reversal or leave to appeal pursuant to MCR 7.302(B)(5).

If this Court does reverse the Court of Appeals or grant leave in this matter, appellant submits that this Court should also reverse the trial court's decision – which the Court of Appeals did not address – because the trial court interpreted section IV (1)(c)(2) of the policy – an exclusion – to create coverage not found under section IV(1)(a)(1), the provision detailing the scope of coverage, despite this Court's decisions in *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997), and *Allstate Ins Co v Freeman*, 432 Mich 656, 667-668; 443 NW2d 734 (1989), indicating that an exclusion cannot create coverage. As a result, appellant asks this Court to reverse the trial court and remand this matter for entry of judgment as a matter of law for appellant, or in the alternative, remand this matter to the Court of Appeals for a proper review of the trial court's decision.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

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